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CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEAN SCHMITZ, Plaintiff - Appellant, Cross-Appellee v. M & M/MARS, a division of M & M Mars, Inc., a Delaware corporation, Defendant - Appellee. Cross-Appellant	Nos. 01-35899 01-35936 D.C. No. CV-98-00825-AJB MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted March 3, 2003
Portland, Oregon

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges.

After a one-week bench trial, the district court granted Dean Schmitz partial relief on his various Title VII claims against M&M/Mars ("Mars"). Schmitz

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appeals and Mars cross-appeals from the district court judgment. Because the relevant facts are known to the parties they are not repeated here.

I

Schmitz challenges the district court's denial of his hostile work environment-based retaliation claim. Schmitz contends that the district court erred because there was sufficient evidence to establish that supervisor Carl Ruffin engaged in inappropriate, racially motivated misconduct. While it found that Ruffin could be abusive and that he lacked credibility as a witness, the district court nonetheless concluded that Schmitz failed to establish adequately that Ruffin's harassment was race based.

We agree with the district court which explicitly found that Ruffin treated other Mars associates in a similar manner. When a manager treats employees of different genders and races in the same manner, even if offensive, it is not actionable under Title VII. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at *discrimination* . . ."). Thus, the mere fact that Ruffin verbally accosted Schmitz, as he did to other employees under his supervision, does not by itself implicate Title VII.

Moreover, the record shows that the allegedly racially motivated decision to retain sales associate Daryl Bell despite his under-performance—the primary point of contention between Ruffin and Schmitz—was made by a reviewing panel of supervisors. While agreeing with Schmitz that Bell's performance warranted a "needs improvement" rating, the panel disagreed with his further recommendation that Bell be discharged. The decision to keep Bell as an employee, therefore, was not even within Ruffin's discretion.[1]

The district court further determined that during the relevant time period Schmitz never reported allegations of race-based harassment to either Steve Collins, Ruffin's manager, or to the Personnel and Organization department ("P&O").[2] When Schmitz finally did file a complaint with P&O concerning

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[1] Schmitz alleges that Ruffin in 1996 made the following statement: "[Bell] is black. I am black. Need I say more?" Schmitz further claims that Ruffin attempted to show a picture of Bell during the panel's assessment of his job performance. These assertions, however, were not part of the district court's factual findings, and Schmitz has not argued in his briefs that the district court's findings as to these issues were clearly erroneous.

[2] Schmitz contests this finding of fact. Generally, we "accept the lower court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been committed." United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc). Here, it is impossible to see how the district court's finding is clearly erroneous. The court, in weighing the testimony of Collins and Schmitz in addition to other circumstantial evidence, reasonably concluded that Schmitz never communicated to Collins that race was a motivating

(continued...)

Ruffin's conduct, Mars conducted an investigation. The company concluded that although Ruffin's conduct was inappropriate, it was not racially motivated. Ruffin was subsequently disciplined by Mars for his unprofessional behavior.

Finally, the district court found that Ruffin consistently recommended to supervisory panels that Schmitz's work warranted a "meets expectation" job performance. Schmitz received the exact same rating from other managers during his tenure at Mars. Indeed, the district court found that "[n]one of Schmitz's managers believed an 'exceeds expectation' rating was warranted for him." The entirety of these factors more than support the district court's determination that Schmitz failed to state a prima facie case of retaliation. Schmitz simply failed to establish that Ruffin's mistreatment of him was racially motivated.

II

Turning to the cross-appeal, Mars challenges the district court's finding of retaliation based on the company's refusal to interview Schmitz for a retail sales supervisor ("RSS") position. Mars notes that the district court itself recognized that the company had a legitimate, nondiscriminatory reason for denying Schmitz an interview.

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[2](...continued)
factor in the demise of his relationship with Ruffin.

Indeed, the district court found: "All of Mars' proffered reasons for denying Schmitz the opportunity to interview for the RSS job, except for Schmitz's issuance of correspondence using Mars' logo or letterhead, were pretextual." Nevertheless, it concluded that "Schmitz's misuse of Mars' letterhead and logo were not sufficient enough reasons to deny him the opportunity to interview." Whether Mars's proffered non-pretextual reason was "sufficient" is a mixed question of law and fact, and thus we review the district court's determination de novo. See Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 871 (9th Cir. 2001).

Such analysis leads us to disagree respectfully with the district court and to conclude that Mars had ample cause to be concerned over Schmitz's improper use of company supplies. Schmitz was laid off in June 1999 and submitted his application for the RSS job opening in April 2000. That means that for almost a year Schmitz had in his possession the computer software necessary to generate Mars's logo on his personal correspondence.

Mars had no idea to whom Schmitz had been representing that he was still an employee of the company. When it received Schmitz's job application on company letterhead in a company envelope, all that Mars knew was that a former employee who had been laid off in a company reorganization the previous year

was sending it correspondence using its own stationery. Mars's concerns were well-founded as it later discovered that Schmitz had used the letterhead in correspondence with the EEOC among others.

Mars further claims that it takes great care in protecting against improper use of its name and logo. Nothing in the record demonstrates that this is mere pretense; nor is there any evidence to suggest that Mars has previously overlooked the misuse of its logo and letterhead by former employees. It is quite reasonable for Mars to expect its management-level employees, like the position for which Schmitz was applying, to be responsible, trustworthy, and able to represent effectively the company in a professional manner. Misappropriation and fraudulent use of the company's stationery in one's job application does not convey such a message.

We therefore conclude that Mars's justifiable concern over Schmitz's improper use of company property and false representation as a company employee is more than "sufficient" to support its rejection of Schmitz's job application.[3] Accordingly, we must reverse Schmitz's retaliation judgment.

III

[3] Because we conclude that Mars's failure to interview Schmitz was not unlawful retaliation, we need not address Schmitz's further claim that he is entitled to economic damages in the form of lost income.

For the foregoing reasons the judgment is

AFFIRMED IN PART AND REVERSED IN PART.